

Europe Does Need a Constitution. But Of What Kind?

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Matej Avbelj's contribution '[Now Europe Needs a Constitution](#)' is surely right in its diagnosis that constitutionalism must play a role in the re-generation of the EU. The gulf between the EU's leaders and its population, and between distinct groups of EU states, is wider than it has ever been. If constitutionalism is an act of 'putting things in common' in a spirit of open dialogue, of deciding on the crucial question about the type of society we want to live in, such a discussion about Europe's future is sorely needed.

The key question, however, is not whether Europe needs a Constitution but what kind of Constitution the EU should build. Many commentators suggest that the lesson to be learned from the failed constitutional project in the early 2000s is that it was too ambitious: too laden with constitutional symbolism and state-paradigms. Perhaps, we argue, the failed constitutional project was not ambitious enough: it made no attempt to break with the models of the previous EU Treaties and in doing so, to capture the political imagination of Europe's citizenry.

Like the current Lisbon Treaty, the Constitutional Treaty was focused on a model of consensus building as the normative anchor of the EU project. The current Treaties embody this consensus in three ways. At a substantive level, the Treaties constitutionalise a number of economic and political goals, attempting to defuse or even 'remove from the political table' conflict over the ends of integration. We live with many of these choices today: the Treaty's monetary policy articles are a foremost example of the choice of earlier EU leaders to avoid contestation of the normative orientation of EMU by constitutionalising its commitment to sound money, creditor responsibility and budgetary prudence.

At an institutional level, we also see consensus building. Successive Treaties have normalised a process of inter-institutional bargaining whereby EU legislation must be the result of a settled consensus between supra-national, parliamentary and inter-governmental interests. Finally, at a spatial level, inter-state conflicts have been dampened by guarantees intended to insulate and protect smaller Member States, from their over-representation in the Council to their ability to block major constitutional changes. The result is an EU replete with veto players, and constitutionally committed to a particular substantive vision of its own ends.

The question of whether we are satisfied with this settlement depends on our view of constitutionalism. If constitutionalism is simply a matter of codification – à la the 2003 Convention – and of binding participants to common rules, a Constitution based on the current Treaties (with one or two tweaks) would be sufficient. If constitutionalism is also, however, an act (hinted at by Matej Avbelj) of political regeneration, and of binding citizens to *an evolving polity*, the EU can do much, much better. The central question to constitutional settlements, 'in which society do we want to live together' is never seriously asked of the European citizenry, and is answered in absence of their voice.

The Eurozone crisis, by destroying the very pillars of consensus-building embodied in the existing Treaties, offers a significant opportunity for constitutional mutation. The reality of Eurozone politics crisis shows the myths lying behind Treaty rules. Far from operating under an 'institutional balance', EU economic governance is driven by the EU's executive arm, using its fiscal resources to reach deep into national welfare state. In this new regime, the illusion of 'spatial balance' is superseded by serious inter-state cleavages over the nature of EMU and the goals that it should pursue. The UK's demands for a re-negotiation of its EU membership are likely to strain inter-state divisions in integration yet further.

These substantive, institutional and spatial cleavages also, however, provide an opportunity for EU constitutionalism to shift its dominant ideational paradigm from a model of consensus to one of conflict. If we accept that the Eurozone involves a fundamental shift of EU action into ever wider areas of policy, it is increasingly unlikely that political disagreement over the direction of EU policy can and should be legally contained or deferred. A new EU constitution would in this sense be a vehicle through which competing views of the end-points of integration could be articulated, contested and generalised. Conflict, can be, if institutionalised properly, a highly productive force in stabilising the EU's integration project, and in aligning the course of that

project much more closely with the desires of its citizenry.

Such a vision would require a major re-thinking of the EU's current Treaty structure. Firstly, it would involve opening-up or even removing altogether functional objectives from the EU Treaties, or Treaty articles that specify how the EU institutions should implement a given policy. The definition of policy-ends would in this sense be 'up for grabs' via the political process. Secondly, it would involve making the supranational EU political process itself (rather than inter-state bargaining) the centre of EU activity, including in the economic field. Such a framework should envisage a range of measures from communitarising economic governance and financial assistance procedures, and a more radical shift away from executive and technocratic towards representative institutions, with a central role for the European Parliament. Thirdly, a serious constitutional project would have to acknowledge that the equality of states is a fiction. The renationalisation of EU politics, for example through the involvement of national parliaments in the legislative process, is normatively unappealing, in so far as is likely to lead to inter-state bargaining and unproductive political conflict along national lines. Instead, a politically responsive EU would settle conflicts by recreating functional cleavages on the European level, and would understand spatial balance as the need to balance between institutions representing citizens *as Europeans* and institutions representing citizens *as nationals* of their states.

The one thing that the Eurocrisis, the refugee crisis, and the discussion on Brexit have in common is that they relate to the one fundamental and one relevant constitutional question: 'how do we want to live together on this piece of earth?' Any answer to this question that is imposed on Europe's citizens; any answer to this question that is simply the outcome of long nights of negotiation between heads of states, will in the long run destabilise and delegitimise the integration project. Worse, it will foster the despondency and lethargy that is as much a symptom as the cause of the EU's crisis. What the EU needs is a constitutional project that does not shy away from what its people want from it.

A longer version of this argument is forthcoming in the European Law Journal – see M. Dawson & F. De Witte, 'From Balance to Conflict: A New Constitution for Europe' (2015) 21 ELJ (forthcoming).

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